STATE OF MICHIGAN

IN THE SUPREME COURT

RICHARD COSTA and CINDY COSTA,

Plaintiffs-Appellants

Vs.

COMMUNITY EMERGENCY MEDICAL SERVICES, INC., a Michigan corporation, DAVE HENSHAW, and SCOTT MEISTER

Defendants-Appellees/ Cross-Appellants

And

LISA M. SCHULTZ, DONALD FARENGER, and JANE AND/OR JOHN DOE,

Defendants-Appellees

Docket Nos. 127334 and 127335

Court of Appeals No. 248104
Lower Court No. 02-202463 NH

127334(86)

12/14

DEFENDANT-APPELLEES/ CROSS-APPELLANTS' BRIEF IN OPPOSITION OF PLAINTIFF-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

DEFENDANT-APPELLEES/ CROSS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL AS CROSS-APPELLANT

NOTICE OF HEARING

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT GRANT PLAINTIFF-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL ON THE QUESTION OF WHETHER THE DEFENDANTS WERE ENTITLED TO SUMMARY DISPOSITION ON THE ISSUE OF GROSS NEGLIGENCE?

Plaintiffs-Appellants' answer is "Yes".

Defendants-Appellees' answer is "No".

II. SHOULD THE GROSS NEGLIGENCE STANDARD FOR MCL 691.1407, INCLUDING THE PROVISION THAT THE DEFENDANTS CONDUCT BE "THE PROXIMATE CAUSE" OF INJURY, APPLY TO THE GROSS NEGLIGENCE PROVISIONS OF MCL 333.20965?

Defendants-Appellees/Cross-Appellants' answer is "Yes".

Plaintiffs-Appellants' answer is "No".

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COUNTER-STATEMENT OF MATERIAL FACTS

This is a medical malpractice case that was filed as a result of an allegation by Richard Costa that he sustained a head injury after being assaulted by his friend and business associate, Joe Baker, while here in Detroit on August 3, 1999. Baker and Costa had been drinking and attended a "gentleman's club" before returning for the night to stay at the Ramada Inn in Taylor Michigan (Exhibit A, Taylor Police records). These Defendants-Appellees are Community EMS, paramedic David Henshaw and specialist Scott Meister, who are alleged to have been grossly negligent in the manner in which they responded to a 911 call for emergency services.

Richard Costa and Joe Baker flew into town from Colorado for the purpose of attending a car auction, which was to be held the next day (Exhibit B, deposition of Richard Costa, p. 22). During the flight, alcohol was consumed by Mr. Costa followed by more drinking at the Playhouse Lounge. (Exhibit A, Taylor Police records). After their evening out, they returned to the Ramada Inn. (Exhibit C, deposition of Mize, p. 66). Apparently, a scuffle or fight occurred in the vehicle in the parking lot of the Ramada Inn. (Exhibit A, Taylor Police records). Someone called 911, which was received by the City of Taylor. (Exhibit A, Taylor Police records).

A 911 call was received at 1:18 a.m. and the Taylor Fire Department dispatched an ambulance and squad car. Taylor also contacted Community EMS, who also dispatched an ambulance. (Exhibit A, Taylor Police records). Paramedic Don Farenger from Taylor and his partner, emergency medical technician Lisa Schultz, were the first to arrive at the scene at 1:22 a.m. (Exhibit A, Taylor Police records, Exhibit G, Taylor run sheet). Shortly thereafter, Taylor police officers Corporal Christopher Mize and his

partner, Patrolman Jeffrey Shewchuk, arrived. Mize began an investigation attempting to determine what had transpired. (Exhibit C, deposition of Mize, p 13). Costa appeared to be intoxicated but not overly so. (Exhibit C, deposition of Mize, p 34-35). Mize noted a small amount of blood on Costa's nostril. (Exhibit C, deposition of Mize, p 34). "...he appeared to be more drunk than injured". (Exhibit C, deposition of Mize, p 34).

Corporal Mize noted that Richard Costa was not initially conscious, noted no blunt trauma, and assumed the loss of consciousness was alcohol induced. (Exhibit C, deposition of Mize, pp 46-47). The policeman investigated what appeared to be a fight by discussing the incident with Joe Baker. (Exhibit C, deposition of Mize, pp 67-68). Baker discussed backhanding Costa. (Exhibit C, deposition of Mize, pp 69-70). There was no information given to Corporal Mize suggesting that this assault occurred outside the vehicle. (Exhibit C, deposition of Mize, pp 59, 71). The punch apparently occurred while Costa was on the phone with his wife. (Exhibit C, deposition of Mize, p 70).

While Corporal Mize was interrogating Baker, paramedic Don Farenger was with Costa. Initially, Costa was not conscious. (Exhibit D, deposition of Farenger, p 62). Community EMS arrived at the scene at 1:27:39 a.m. with an advanced life support unit manned by paramedic David Henshaw and specialist Scott Meister (Exhibit E, CEMS dispatch records). Paramedic Farenger used an ammonia stick to awaken Costa (Exhibit F, deposition of Schultz, Vol. I, p 66, Exhibit G, Taylor run sheet; Exhibit D, deposition of Farenger, pp 66-67). Richard Costa was offered medical assistance, which he refused. (Exhibit H, deposition of Schultz Vol. II, pp 251-252; Exhibit C, deposition of Mize, pp 100, 102; Exhibit G, Taylor run sheet; Exhibit D, deposition of Farenger, p 131).

Paramedic Henshaw, though not providing hands-on treatment to Costa, assisted paramedic Farenger in assessing Mr. Costa. (Exhibit F, deposition of Schultz Vol. I, p 145). Richard Costa appeared competent to elect not to receive medical attention. (Exhibit H, deposition of Schultz II, pp 251-25; Exhibit C, deposition of Mize, p 100; Exhibit D, deposition of Farenger, p 131). Corporal Mize attempted to get Costa to press criminal charges but he refused. (Exhibit C, deposition of Mize, p 100). Once it was determined that Costa had refused transport or to be treated, all emergency personnel and the police left the scene, which was at approximately 1:44. (Exhibit E, CEMS dispatch records). There was nothing that occurred to suggest a head injury. (Exhibit C, deposition of Mize, p 102; Exhibit D, deposition of Farenger, p 135).

At approximately 7:25 a.m., a second 911 call was received. Different emergency personnel and police were dispatched to the Ramada, where they found Richard Costa unconscious with a fixed and dilated pupil, indicative of a head injury (Exhibit I, CEMS run sheet). Costa was transferred to Oakwood Hospital and then the University of Michigan Hospital, where he was diagnosed with a head injury.

Also of relevance to this Application is the testimony of Plaintiffs' expert, Keith Black, M.D., a neurosurgeon. Dr. Black admits this head injury could not have been discovered even had the paramedics palpated the skull of Mr. Costa.

Q. If there is an indentation, would you agree with me that it would be a slight indentation?

A. Yes.

Q. So, if you were to palpate it, is it possible that you might not appreciate the fact of the fracture?

A. You mean palpate it through – without making an incision or –

Q. Yeah. Just with your hands, if you are feeling it with your hands.

A. At the time of surgery or in the field?

Q. In the field.

A. **Well, I think if you fill (sic) it with your hands in the field, you are not likely to feel a skull fracture.** If you have significant injury within the scalp, you are going to get bleeding in the scalp as well –

Q. But the bleed – I think you told me earlier – is kind of a slow developing bleed. There is an initial laceration of the artery which then starts a slow bleed? Is that my understanding?

A. I think there are really two different issues. There is a bleed, an epidural bleed, which is occurring within the skull and the dura.

Q. I'm sorry. I couldn't hear you.

A. There is an epidural bleed, which is a bleed occurring between the skull and the dura. That bleed you cannot palpate over the scalp. If a patient has significant trauma, then you are very likely to feel a scalp contusion as well, and certainly –

* * * *

A. Okay. If you palpate it – an injury like this in the field – what you are most likely to feel is the scalp contusion rather than an actual skull fracture.

* * * *

Q. **Was there anything in either the Heritage or University of Michigan records that references a scalp contusion?**

A. **Not that I saw.** But, you know, it certainly is possible that they may have.

(Exhibit J Dep of Dr. Black, pps. 18 – 20, emphasis supplied).

Likewise, there is no factual dispute but that Mr. Costa, at the time of his refusal to be transported, was competent to make this decision. Plaintiffs' expert, Dr. Black , has provided the following testimony on that issue:

> Q. Would you agree with me that after Mr. Costa came to at the scene in the presence of the various police and ambulance personnel, that he experienced a period of relative lucidity?
>
> A. Yes.
>
> Q. Do you agree that at that point in time, he was competent to make decisions regarding his own health status?
>
> A. Would he be competent to make decisions regarding his own health status?
>
> Q. As opposed to being drunk and unable to make competent decisions.
>
> A. Yes, I think he could.

(Exhibit J, p. 27, lines 7 – 19).

LEGAL ARGUMENT

A. THIS COURT SHOULD NOT REVIEW THE QUESTIONS PRESENTED BY THE PLAINTIFFS-APPELLANTS' IN THEIR APPLICATION FOR LEAVE TO APPEAL WITH RESPECT TO THE ISSUES REGARDING GROSS NEGLIGENCE, AS THOSE ISSUES DO NOT INVOLVE A RECOGNIZED GROUND FOR APPEAL PURSUANT TO THE PROVISIONS OF MCR 7.302(B)

The Essential Health Provider Recruitment Strategy Act, MCL 333.20965(1) provides:

> Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a ...emergency medical technician specialist, paramedic, ... do not impose liability in the treatment of a patient on those individuals ...

In the case at bar, the Michigan Court of Appeals followed the applicable case law interpreting the EHPRSA, and also properly addressed and applied the appropriate public policy considerations presented by that statute.

The purpose of the Essential Health Provider Recruitment Strategy Act, MCL 333.20965, formerly the Emergency Medical Services Act, was to limit the exposure to liability in the course of treatment in emergency conditions by emergency personnel. *Jennings vs.Southwood,* 446 Mich. 125, 133-135 (1994).

In this case, the qualified immunity (for acts or omissions other than those resulting from "gross negligence") applies to the direct claims against paramedic David Henshaw and specialist Scott Meister, as well as to the claims for vicarious liability alleged against Defendant-Appellee Community EMS. The definition of the term "gross negligence" as it is used in MCL 333.20965 was provided by this Court in *Jennings*. In that case, this Court held that the definition found in Section 7 of the Governmental Tort

Liability Act (MCL 691.1407), is "the standard for gross negligence under the EMSA". *Id.* at 137. The *Jennings* Court went on to hold that "gross negligence" for purposes of the EMSA, (now the Essential Health Provider Recruitment Strategy Act), is "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results", the same definition for gross negligence as that found in Section 7 of the GTLA. *Id.* at 136.

A significant number of cases have addressed the issue of what acts or omissions will create a question of fact as to whether "gross negligence" has occurred. In *Jackson v Saginaw County*, 458 Mich 141, 580 NW2d 870 (1998), defendant (a government employee physician) allegedly failed to perform tests, examinations, referrals and other follow-up care in response to plaintiff's chronic sore throat problems while plaintiff was incarcerated in a county correctional facility. Plaintiff was ultimately diagnosed with throat cancer, and his larynx was surgically removed. Plaintiff brought a claim against defendant physician for gross negligence under GTLA. In upholding the trial court's order granting summary disposition in favor of the defendant physician, the *Jackson* Court held:

> While the plaintiff is entitled to all reasonable inferences, we cannot find it reasonable to infer that, assuming arguendo that Dr. Uy should have referred the plaintiff for a laryngoscopic examination sooner, his lack of doing so could demonstrate such a substantial lack of concern. The record does indicate that Dr. Uy continued to treat the plaintiff with a variety of medications, as well as administering various tests, and that Dr. Uy reacted with different treatments each time the plaintiff was seen by him. In such circumstances, we must agree with the trial judge that reasonable minds could not differ in concluding that Dr. Uy's conduct in the course of his treatment of the plaintiff could not amount to gross negligence as defined in the statute. [footnote omitted]. *Id.* at 151.

In *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999), the defendants, employees of a state run psychiatric institution, killed the plaintiff's decedent while attempting to restrain him during an outburst in which he posed a serious danger to himself and others. In upholding the trial court's order granting summary disposition in favor of the defendants, the Supreme Court held:

> The imminent danger posed by decedent's volatile behavior required that the staff exercise splint-second judgment in deciding how and when to use physical intervention. While they may have used other means to restrain Maiden, reasonable minds could not agree that the failure to comply those alternatives was so reckless "as to demonstrate a substantial lack of concern for whether an injury results". *Id.* at 126-127.

As the standard for "gross negligence" under the Essential Health Provider Recruitment Strategy Act is the same standard as under the GTLA, the holdings in *Maiden* and *Jackson* apply to this case. Consequently, the question which should have been addressed by the trial court, was whether the facts in this case would allow reasonable minds to differ as to whether defendant's paramedics demonstrated "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results".

Here, the emergency personnel are being criticized for an incomplete or sub-standard assessment. It is argued that these personnel were negligent in their failure to take vital signs, their misinterpretation of alcohol intoxication for a head injury, failing to assess the cause of the loss of consciousness, permitting Costa to refuse transportation when Costa "...was known to have struck his head on the pavement after being struck in the face...", failing to explain the consequences of a refusal to transport, failing to adequately assess Costa by palpating his skull, and delaying in providing treatment. (Exhibit K, Plaintiff's complaint, Para 17, a-g).

Here, as in *Jackson* it is questionable as to whether ordinary negligence occurred. Here, as in *Jackson*, the defendant did take some affirmative steps to provide an assessment or treatment (various tests and medications in *Jackson*, attempting to evaluate Costa's intoxication as a cause of his loss of consciousness). In addition, here, as in *Jackson*, reasonable minds could not differ in concluding that the defendants' conduct could not amount to gross negligence as defined in the statute. (See *Jackson* at 150-151). Nevertheless, the trial judge denied the motion for summary disposition without providing any guidance for his rationale.

Interestingly, at the time this case was argued in the Court of Appeals, the Court of Appeals has already decided a nearly identical case, albeit in an unpublished opinion. In *Ingesoulian v City of Lincoln Park,* Court of Appeals No. 226778, released February 5, 2002, (Exhibit L), the Court of Appeals was confronted with the very same facts we see in the case at bar. Although *Ingesoulian* is an unpublished opinion, Defendants-Appellees submit it is persuasive authority because the legal issues are identical to those presented in this case, and because the facts are remarkably similar to the facts in the case at bar.

The paramedics in *Ingesoulian* arrived on the scene of a call for emergency services, but were not advised that *Ingesoulian* had hit his head. The plaintiff refused treatment and transportation. He was also intoxicated and had no apparent injury that would have alerted the paramedics to a potential head injury. Plaintiff advanced the same allegations of failing to insist on a more complete physical examination or transportation. *Ingesoulian* also submitted an expert's affidavit in an attempt to usurp this Court's decision making function in such cases. Ultimately, the *Ingesoulian* panel found the

conduct of the defendants in that case did not rise to the gross negligence standard of *Jennings* and *Maiden,* stating:

> While Rusek and Dyer may have been negligent in failing to insist upon a more complete physical examination or transportation to a hospital, their conduct did not "demonstrate a substantial lack of concern for whether an injury results" and plaintiff's expert's statement that defendants' violation of the applicable standard of care constituted gross negligence did not make it so. Exhibit N, pp. 1-2.

Ingesoulian is indistinguishable from the case at bar. This Court should follow the *Ingesoulian* panel in finding that the similar acts do not give rise to a genuine issue of material fact concerning gross negligence.

Clearly, the allegation that co-defendant paramedic Donald Farenger should have conducted an assessment, which included palpating Richard Costa's head, does not lead to the suggestion this head injury would have been discovered. As in *Ingesoulian,* these defendants did not and could not have known of the head injury without express notification of same.

Even assuming the paramedics had discovered a head injury; they still were powerless to transport Mr. Costa in light of his written refusal. Michigan law prohibits the transportation of an individual who objects to same.

> ***333.20969*** **Objection to treatment or transportation.**
>
> Sec. 20969. This part and the rules promulgated under this part do not authorize medical treatment for or transportation to a hospital of an individual who objects to the treatment or transportation. However, if emergency medical services personnel, exercising professional judgment, determine that the individual's condition makes the individual incapable of competently objecting to treatment or transportation, emergency medical services may provide treatment or transportation despite the individual's objection

unless the objection is expressly based on the individual's religious beliefs.

As noted earlier, Mr. Costa refused transport at the time of his encounter with Defendants-Appellees/Cross-Apellants.

B. BECAUSE THE GROSS NEGLIGENCE STANDARD FROM MCL 691.1407 INCLUDES THE PROVISION THAT GROSS NEGLIGENCE BE "THE PROXIMATE CAUSE" OF INJURY, THAT STANDARD MUST BE APPLIED TO CLAIMS FOR IMMUNITY PURSUANT TO MCL 333.20965

At the trial level, Defendant-Appellee Community EMS raised as an issue, the argument that summary disposition should be granted because Plaintiff's conduct was not "the proximate cause" of decedent's injuries. To be sure, the Complaint alleges that the Plaintiff was involved in an assault at the hands of Joe Baker. Plaintiff's complaint, Exhibit M, alleges:

> 8. ...The co-worker, Joe Baker, reportedly struck Mr. Costa during the altercation **causing** him to fall backwards and strike his head on the pavement. (Emphasis supplied).

In *Jennings,* this Court held that the GTLA and EMSA (MCL 691.1401 et. seq. and MCL 333.20965) should be read *in pari materia* because they share a common purpose of immunizing certain agents from ordinary negligence and permitting liability for gross negligence. *Id.* at 136. The *Jennings* Court concluded:

> Because these provisions should be read in pari materia we deem it appropriate to use the definition of gross negligence as found in §7 of the GTLA, as ***the standard*** for gross negligence under EMSA. *Id. at 137*, emphasis added.

MCL 691.1407(2)(c) provides in pertinent part:

> The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate substantial lack of concern for whether an injury results.

Defendants-appellants believe the "standard" for gross negligence under MCL 691.1407, includes that any gross negligence be *"the proximate cause"* of a plaintiff's injuries. In *Robinson vs. City of Detroit,* 462 Mich 439 (2000), this Court held summary disposition for defendants on gross negligence issues involving MCL 691.1407 was proper because the defendants were not *"the proximate cause"* of plaintiff's injuries. *Id.* at 462-463. The Court noted that to be "the proximate cause" of Plaintiff's injury, it must be "the one most immediate, efficient, and direct cause of the Plaintiff's injuries". *Robinson* at 462, 463, and 469.

Here, in addition to the alleging the cause of the injury as Baker's blow, Plaintiff-Appellant has also made allegations against Community EMS, two of its personnel, and two employees of the City of Taylor. It cannot be said that there is a single, most efficient cause under these facts. Any one of the above individuals could be said to be the most direct and efficient cause of Mr. Costa's injury.

It is Defendants-Appellees/Cross-Appellants' position that the analysis applied by the *Robinson* Court should be applied to this case for the reasons set forth in *Jennings.* Because the statutes are intended to provide limited immunity, they share a common purpose, and should be read *in pari materia.* Accordingly, the standard for gross negligence under the GTLA (which requires that a plaintiff prove a defendant's gross negligence was *"the proximate cause"* of injuries) should be applied to claims for gross negligence under the Essential Health Provider Recruitment Strategy Act.

RELIEF REQUESTED

Defendants-Appellees/Cross-Appellants Community EMS, David Henshaw, and Scott Meister, respectfully request that this Court deny Plaintiffs-Appellants' Application for Leave to Appeal on the grounds that Plaintiffs-Appellants have failed to establish any of the grounds for appeal set forth in MCR 7.302(B). Additionally, Defendants-Appellees/Cross-Appellants pray this Court grant their Application for Leave to Appeal as Cross-Appellants on the question of whether the standard for proximate cause in gross negligence cases ("the proximate cause") set forth in the GTLA should apply to questions of gross negligence arising out of the provisions of MCL 333.20965.

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Date: November 15, 2004

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